

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA ISP ASSOCIATION, INC.,

Complainant,

vs.

PACIFIC BELL TELEPHONE COMPANY
(U-1001-C); SBC ADVANCED SOLUTIONS, INC.
(U-6346-C) and DOES 1-20,

Defendants.

Case 01-07-027
(Filed July 26, 2001)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants The Utility Reform Network (TURN) and the Utility Consumers' Action Network (UCAN) \$22,777.11 for substantial contributions to Decision (D.) 03-07-032. In that decision, the Commission approved a settlement between the California ISP Association (CISPA) and SBC California and its affiliate Advanced Solutions Inc. (collectively, SBC/ASI). TURN, UCAN and three independent Internet Service Providers (ISPs) intervened in the proceeding to provide comment and evidence as to whether the original proposed settlement between CISPA and SBC/ASI was in the public interest.

1. Background

CISPA in 2001 filed a complaint against SBC/ASI alleging unlawful discrimination in the provision of Digital Subscriber Line (DSL) Transport services. A Scoping Memo narrowed the issues to be resolved in the complaint, a ruling denied a motion to dismiss by defendants for lack of jurisdiction, and there were several procedural motions regarding discovery. TURN and UCAN monitored the proceeding, especially the issues regarding Commission jurisdiction over DSL, but did not seek to formally intervene.

On August 12, 2002, CISPA and SBC/ASI filed a joint motion to withdraw the complaint, stating that the parties had reached a settlement that resolved the dispute and served the interest of independent ISPs. The settlement agreement itself, however, was said to be proprietary and therefore was not available to the public. After protests by independent ISPs and TURN and UCAN, the settling parties made the settlement agreement public on August 29, 2002.

TURN and UCAN state that they became concerned that CISPA's interests had diverged from those of small business and residential consumers. On September 10, 2002, TURN and UCAN filed a motion to intervene and opposed the joint motion to withdraw. By Administrative Law Judge (ALJ) Ruling on December 17, 2002, the motion to intervene was granted on the basis that TURN and UCAN "have an interest in this complaint as representatives of end-users concerned with the competitive provisioning of internet services." (ALJ Ruling, at 5.)

In the same ruling, the ALJ denied the joint motion to withdraw the complaint and ordered that the Commission review the proposed settlement under Rule 51.1 "to determine whether it is reasonable in light of the whole record, consistent with law, and in the public interest." (ALJ Ruling, at 13.) The ruling delineated several provisions of the proposed settlement for review,

requiring CISP and SBC/ASI to convene a settlement conference for all parties, to file and serve a report on whether the settlement would be modified, and allowing other parties to comment on the settlement report.

Parties conducted two settlement conferences on January 3 and January 29, 2003. CISP and SBC/ASI filed a revised settlement on February 10, 2003, and parties filed comments on February 20 and March 10. On June 3, 2003, the ALJ issued a draft decision approving the revised settlement with modifications. Parties filed comments on the draft decision, and the Commission subsequently issued its final decision (D.03-07-032) approving the settlement but requiring the settling parties to adopt some modifications. The settling parties filed a final settlement on July 21, 2003, and the case was closed on September 5, 2003, with the issuance of D.03-09-009.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§1801-1812. Pub. Util. Code § 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference or by a date established by the Commission.

TURN and UCAN state that they are incorporating the relevant provisions of the NOI into this request for compensation. They state that there was no prehearing conference after their intervention in this case, and they delayed the filing of an NOI until now because it was not immediately clear whether the case would be dismissed. Pursuant to Pub. Util. Code § 1804(c), this combined NOI and request for compensation was filed within 60 days of the final decision closing this complaint case. Under the unusual circumstances of this proceeding, we deem the NOI filing timely. Both TURN and UCAN have established in prior filings that each is a “customer” as that term is used in the intervenor

compensation statutes. (*See, e.g.*, D.98-04-059, ALJ Ruling in Application (A.) 02-12-028.) Each has established significant financial hardship under Pub. Util. Code § 1804(a)(2)(B). (*See, e.g.*, ALJ Ruling in A.01-09-003, ALJ Ruling in A.02-12-028.)

Section 1804(c) requires an intervenor requesting compensation to provide “a detailed description of services and expenditures and a description of the customer’s substantial contribution to the hearing or proceeding.”

Section 1802(h) states that “substantial contribution” means that,

in the judgment of the commission, the customer’s presentation has substantially assisted the Commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.

Section 1804(e) requires the Commission to issue a decision that determines whether or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to individuals with comparable training and experience who offer similar services, consistent with Section 1806.

3. Contributions to Resolution of Issues

Participation in this proceeding by TURN and UCAN meets the Commission’s criteria for determining whether an intervenor has made a substantial contribution to a Commission decision, as discussed below.

3.1 Procedural Status of Settlement

In their opposition to the motion to withdraw the complaint, TURN and UCAN argued that withdrawal would leave the settlement in limbo without Rule 51 review. The ALJ Ruling agreed, adopting the recommendations of TURN and UCAN on the threshold matter of whether the Commission should consider details of the proposed settlement under Rule 51.

3.2 Limits on Participation

The proposed settlement required CISPAA to withdraw its comments in a pending Section 271 proceeding and prohibited CISPAA from participating in any further Commission proceedings that involve Section 271 of the Telecommunications Act or Pub. Util. Code §§ 709.2 or 851. TURN and UCAN objected to these limitations. The ALJ Ruling noted this opposition and required the parties to reexamine these provisions. In the subsequent settlement discussions, the provisions were substantially revised. The final decision acknowledges, with approval, the deletion of references to participation in unrelated Commission proceedings. (D.03-07-032, at 10.)

3.3 Limits on Related Claims

TURN and UCAN also objected to language in the proposed settlement that appeared to bind individual CISPAA members with respect to claims brought on related matters. Among other things, TURN and UCAN argued that the proposed settlement compromised the Commission's own ability to investigate allegations against the settling parties by prohibiting CISPAA or its members from discussing events involved in a complaint with Commission staff. Again, the ALJ Ruling acknowledged these objections and listed them in guidance on how the proposed settlement should be revised. The revised settlement amended these provisions, and the final decision notes that the revision "makes clear that

parties are not prevented from complying with legal obligations to provide information to the Commission or to a third party in future proceedings.”

(D.03-07-032, at 10.)

3.4 Exemption for Packetized Voice

Despite substantial changes in the revised settlement, TURN and UCAN continued to oppose approval of the settlement, arguing that it did not resolve operational issues raised by some of the independent ISPs. Further, TURN and UCAN argued that the revised settlement contained unacceptable language on the provisioning of packetized voice. The proposed decision adopted the positions of TURN and UCAN and ordered the settling parties to delete the packetized voice restrictions from the agreement. The final decision maintained that order, and the settling parties complied in their final settlement.

4. Did TURN and UCAN Make a Substantial Contribution?

SBC/ASI oppose the request of TURN and UCAN for an award of intervenor compensation, arguing that these organizations came into the case late, conducted no discovery, and played only a limited role in the final resolution of issues. SBC/ASI state that TURN and UCAN representatives attended the settlement meetings by phone, rather than in person, and the issues they addressed were adequately presented by individual ISPs at those meetings. Finally, SBC/ASI argue that the NOI should have been filed earlier in this proceeding and that, in any event, the combined NOI/request for compensation was filed a day late and should be deemed untimely.

TURN and UCAN reply that they intentionally did not enter the case in order not to duplicate the litigation being pursued by CISPA, and that this conservative approach resulted in a relatively small compensation request of less than \$23,000 for both TURN's and UCAN's time. TURN and UCAN state that only when CISPA decided to enter into a “controversial” settlement did the two

organizations decide to intervene to protect the interests of their constituents. TURN and UCAN say they intervened with the support of independent ISPs and were able to advise those parties on Commission practice and some of the legal issues created by the proposed settlement. TURN and UCAN state that their filing of the NOI/request for compensation was not untimely, since the “final” decision in this case (D.03-09-009) came on September 5, 2003, while the NOI/request for compensation was filed on September 15, 2003. TURN and UCAN state that they chose the earlier substantive decision (D.03-07-032) to start the clock running and they ask that the Commission, if necessary, accept the filing one day late. As we have done in previous cases (*see* D.91-11-065, D.92-02-032), we deem the filing here timely given the circumstances of this proceeding. We note that while the claimed substantial contributions were to D.03-07-032, it was the later decision, D.03-09-009, that actually closed the proceeding.

More importantly, the standard for receiving intervenor compensation is based on the useful work performed by the intervenor, as reflected in the Commission’s adopting positions or recommendations advocated by the claimant. The approach taken by SBC/ASI suggests that intervenors should receive compensation on the basis of showing up early in a proceeding and filing numerous documents. That is not the standard that we have followed. It is the usefulness of an intervenor’s contribution that is and should be the gauge.

As we have noted above, the resolution of this proceeding reflects important contributions made by TURN and UCAN. We conclude that TURN and UCAN contributed to the Commission’s decision-making process by persuading the Commission to adopt several of the intervenors’ positions, in whole or in part, and by ensuring a full discussion of different substantive

positions. It is clear that TURN and UCAN contributed substantially to the development of a quality record.

We find further that no reduction of compensation for duplication is warranted on this record. While some overlap with others was unavoidable, TURN and UCAN took steps to keep duplication to a minimum and to ensure that when it did happen, their work served to complement and assist the showings of the other parties.

TURN and UCAN acknowledge that it is difficult to assign a dollar value to the benefits achieved through their contribution to D.03-07-032. However, they contend, and we agree, that the costs claimed here are outweighed by the value of their contribution to the development of a quality record on the important substantive issues in this proceeding.

5. Reasonableness of Requested Compensation

TURN and UCAN request compensation for all of the time and expenses reasonably devoted to its participation in this proceeding, for a total request of \$22,777.11.

Advocate's Fees

R. Costa	3.75 Hours	X	\$200 (2003)	=	\$ 750.00
C. Mailloux	34.75 Hours	X	\$275 (2002/03)	=	\$ 9,556.25
C. Mailloux	13.00 Hours	X	\$137.50 (Comp)	=	\$ 1,787.50
R. Finkelstein	1.75 Hours	X	\$340 (2002)	=	\$ 595.00
R. Finkelstein	2.00 Hours	X	\$170 (Comp)	=	\$ 340.00
M. Shames	47.90 Hours	X	\$195 (2002/03)	=	\$ 9,340.50
SUBTOTAL					= \$ 22,369.25

Other Costs

Copies	=	\$ 374.20
Postage	=	\$ 33.66
SUBTOTAL		= \$ 407.86
TOTAL REQUESTED		= \$ 22,777.11

3.5 Hours Claimed

TURN and UCAN have presented their attorney and advocate hourly records in an appendix to the request for compensation. The information reflects the hours devoted to reviewing the records, drafting comments and responses, and participating in settlement conferences. Consistent with Commission policy, TURN billed half of its attorney rate for time related to preparation of this compensation request.

The hours claimed by TURN and UCAN are reasonable. Christine Mailloux was TURN's lead attorney in this case. Michael Shames was the lead attorney for UCAN. The majority of hours claimed by TURN belong to Mailloux, with only minor support from other TURN advocates. Appendix A of the request for compensation contains a daily listing of the tasks performed by Mailloux, Regina Costa and Robert Finkelstein. Appendix B in the document contains an accounting for Shames. The hours included in the request for compensation cover the period from August 2002 through the issuance of D.03-07-032.

3.6 Hourly Rates

Section 1806 requires the Commission to compensate eligible parties at a rate that reflects the "market rate paid to persons of comparable training and experience who offer similar services." Most of the hours claimed are for Mailloux, who was TURN's lead attorney on the case. Mailloux has an approved rate of \$250 per hour for work performed in 2001 (D.03-01-074) and an approved rate of \$275 for work performed in 2002 (D.03-05-027). Because of the relatively few hours recorded in 2003, TURN limits its request to \$275 for all of this attorney's time.

TURN requests an hourly rate for Costa of \$200 for her work in early 2003. Costa is TURN's telecommunications research director. The \$200 rate was previously approved by the Commission in D.03-05-027.

At the time this request was filed, Finkelstein was an experienced supervising attorney, and the \$340 rate requested had previously been approved by this Commission for work in the year 2002. (*See* D.03-01-074.) Because of the small number of hours devoted to supervising this compensation request, TURN asserts that it is appropriate to apply the 2002 rate to his work on this matter in 2003. We agree.

UCAN requests an hourly rate of \$195 for Shames's attorney hours. This is the same rate that UCAN was awarded for his work since 1996. (*See* D.96-09-065 and D.00-01-045.) UCAN has voluntarily capped its billing rate for this attorney at \$195 per hour and seeks no increase in his rate for work performed in 2002 and 2003.

We find that the rates requested by TURN and UCAN for its advocates are reasonable and reflect market rates or are below market rates for individuals of similar experience and qualifications.

3.7 Other Costs

TURN and UCAN claim \$407.86 in administrative and other miscellaneous expenses associated with the work performed in connection with D.03-03-038. We have examined the documentation supporting these requests. We find that the remaining administrative and miscellaneous costs are reasonable.

6. Award

We award TURN and UCAN \$22,777.11 for their substantial contributions to D.03-07-032. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after TURN and UCAN filed

this compensation request (the 75th day was November 30, 2003) and continuing until full payment of the award is made.

The award is to be paid by SBC California as the regulated entity in this proceeding. The parties have asked that any award of compensation be paid directly to TURN in order to avoid administrative glitches in making a joint award. UCAN and TURN have agreed that TURN will forward to UCAN its share of the award. We will follow that procedure.

7. Waiver of Comment Period

This is a compensation matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(3), the otherwise applicable 30-day review and comment period is being waived.

8. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and ALJ Dorothy Duda is the presiding officer.

Findings of Fact

1. TURN and UCAN timely requested compensation for contributions to D.03-07-032, as set forth herein.
2. TURN and UCAN request hourly rates for their attorneys and advocates that have been approved earlier by the Commission as reasonable based on a comparison to market rates for individuals of similar experience and qualifications.
3. Administrative costs of \$407.86 are reasonable.

Conclusions of Law

1. TURN and UCAN have fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation.
2. TURN and UCAN should be awarded \$22,777.11 in compensation for substantial contributions to D.03-07-032.
3. This order should be effective today so that TURN and UCAN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) and the Utility Consumers' Action Network (UCAN) are awarded \$22,777.11 as set forth herein for substantial contributions to Decision (D.) 03-07-032.
2. The award should be made payable by SBC California to TURN, which will forward UCAN's share of the award to UCAN. Interest shall be paid at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release, H.15, with interest beginning on November 30, 2003, and continuing until the full payment has been made.
3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision(s)	D.
Contribution Decision(s):	D0307032
Proceeding(s):	C0107027
Author:	ALJ Duda
Payer(s):	SBC California

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network and Utility Consumers' Action Network	9/15/03	\$22,777.11	\$22,777.11	

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Regina	Costa	Policy Expert	The Utility Reform Network	\$200	2003	\$200
Christine	Mailloux	Attorney	The Utility Reform Network	\$275	2002	\$275
Christine	Mailloux	Attorney	The Utility Reform Network	\$275	2003	\$275
Robert	Finkelstein	Attorney	The Utility Reform Network	\$340	2002	\$340
Michael	Shames	Attorney	Utility Consumers' Action Network	\$195	2002	\$195
Michael	Shames	Attorney	Utility Consumers' Action Network	\$195	2003	\$195